

The committee chosen by the Town to investigate and report at this meeting in regard to a certain promissory note of Five thousand dollars made and negotiated by Franklin Este Town Treasurer bearing date April 2^d 1870 - said note being held and owned by the Free Industrial School of Science - Worcester -

Have attended to their duty by submitting documents and facts bearing on the case to F. P. Goulding, Esq., Councillor at Law, Worcester, from whom they have obtained the following opinion -

*** Here follows the written opinion

Residence, 44 Harvard St.

2

Worcester, Mass., April 25 1884.

Joseph Burnett & others, ^{Committee of} Southborough
Gentlemen

You have submitted to me certain questions as to the liability of the town of Southborough upon a note for \$5000, dated April 2. 1870, held by the Worcester County Free Institute of Industrial Science, and signed "Inhabitants of the Town of Southborough. By F. Este Treas." -

I have examined the record of the vote passed at the March meeting of 1870, and also the article in the warrant relating to this matter.

For the purpose of this opinion I assume the following facts to be true:

(1) That the municipal affairs of the town at the time that meeting was held, required that twenty thousand dollars should be borrowed, and that the other parts of the town records would show the purposes for which the money was to be borrowed.

(2) That Este received the money from the Institute, and appropriated it to his own use.

(3) That he made no record of the note, but on the contrary concealed its existence, and his own embezzlement, paying

the interest on it out of his own funds until the present year.

(4) That the Institute had no notice or knowledge of the fraud until the present year.

Under those circumstances I can have no doubt that the town is liable on the note.

By the terms of the Statute towns are authorized to make contracts necessary and convenient for the exercise of their corporate power; and it has always been held that they may borrow money for the legitimate objects of municipal expenditure, and give their notes or other obligation, as evidence of the debt.

By the terms of the vote the treasurer was authorized to borrow a sum of money not exceeding twenty thousand dollars and give a town note or notes therefor. The act of the treasurer in borrowing the money and giving the note was within the exact authority conferred.

The article in the warrant although general in its terms was sufficient to found the vote upon.

The warrant is designed to give the inhabitants notice of the subject matter of action at the meeting, and it is sufficient, if that is done substantially.

I do not see therefore, that any valid defence exists to the note

inserted.

The remedy of the town would seem to be to pay the note and proceed against the bondsmen of the defaulting treasurer.

If a bond was given that year by the treasurer, in the common form, for the faithful discharge of the duties of his office the sureties thereon would be liable to the town for the amount which the latter has to pay on the note.

It would make no difference that the bond is lost or destroyed, provided the fact that it was given is susceptible of proof.

Yours truly

Frank M. Goulding

3. From which it appears that the Town is holden and must protect the note, and your committee would respectfully recommend that the Town take such action as may be necessary to provide for and pay said note, and furthermore to proceed to collect the same by suit at law, or otherwise, against the principal or the sureties or either, or all of them, as may be deemed best -

of which is respectfully submitted by -
for the interests of the town.

Joseph Burnett

P. F. Brewster
J. B. Robinson

Committee

1884.

Report of Committee
of Investigation in
regard to a note
given by F. Estle, Treas.
Dated, Apr. 2nd, 1870.

The Committee appointed by the Town
to investigate the official conduct of Franklin
Este, late Town Treasurer, with power to
send for books & papers, and to employ Counsel
&c.

Respectfully Report,

That they have attended to that duty and that
they employed as Counsel, F. G. Goulding
Esq of Worcester, and as Expert of accounts,
N. D. Bradbury Esq of Boston.

An examination of the books of the Town
Treas^r (as kept by the late Town Treas^r)
showed that they were kept in a loose
and unsatisfactory manner, with
no full and fair record of his money
transactions, with and for the town & that
they failed in many instances to show
actual debits and credits.

They found also that he had at
different times, used the credit of
the town as officially given to procure
funds for his own use, making no
record in the town books of the same,
thereby becoming liable to the charge
of Embezzlement, for which, it appears
the Grand Jury have found a bill against
him.

Respectfully Submitted

For the Committee

Southborough March 23
1885.

Joseph Burnett
Chairman

Report of
Committee of Investigation

March 23^d 1885,

Accepted,

Bacon Hopkins & Bacon
BACON, HOPKINS & BACON, *Attorneys on the Public*
Counsellors at Law, *Clerks for the Court*
1883

P. C. Bacon. W. S. B. Hopkins. Henry Bacon.

Worcester, Mass., March 9 1883

Selectmen of
Southboro,

Gentlemen,

I have received the
Copy of the Town Records of your
showing that your Town did in
fact make choice of Three
Highway Surveyors in the
usual way and the records you
sent me do not say a word
about your Town have voted
that the Selectmen having the
Charge of the Road, or the
Repair of the Road or of the
Selectmen having any thing
to do with the Roads in
your Town & I shall therefore

in giving my opinion take
it for granted that the Town
did nothing & voted nothing
except to choose Three
Highway Surveyors I shall
also take it for granted that
the Selectmen did assign the limits
to the Surveyors verbally but not
in writing as required by Section
4 of Chap. 52 of the Pub. Statute
that they assigned these limits before
the first day of May -

Now the question is upon the
facts as stated to me the other
day by Mr. Hammond whether
your Town is liable to the
Complaining Party for the
Injury if any that has
been sustained

And the first
question is was there any

Counsellors at Law,

P. C. Bacon. W. S. B. Hopkins. Henry Bacon.

Worcester, Mass., 188

defect or want of repair in Town
Highway, the alleged defect
being in the sidewalk & the
sidewalk though within the
limits of the located Highway
being one not laid out or
constructed under the direction
of the Town or Town authorities
but constructed by the individuals
or abutters by the side of the highway
or brought part of the highway

This question was the main
 & principal question passed
upon & decided in the case
 of Worcester against Fitchburg
reported in the 110th Vol. Mass
Reports page 336

what you can find in your
Town Clerk's Office I think
you will find that your
Case has got the same facts
substantially as are found in
this Fitchburg Case. In that
Case the sidewalk had not
been even constructed or repaired
by the Town of F. And as in the
F. Case & so in yours the
sidewalk had been there for
a considerable number of
years & it had considerable
travel. No doubt in the F. Case
the Land owners or abutters had
constructed that side walk &

The single Judge who tried
the ^{Fitchburg} Case (with a jury) ruled
as a matter of Law that
the Place where the injury
happened was not a part of

Counsellors at Law,

P. C. Bacon. W. S. B. Hopkins. Henry Bacon.

Worcester, Mass., 188

a part of the Street or Highway that the Town was bound to keep in repair & the Judge ordered a verdict for the Town.

But the full Court as you will see decided that the Judge was mistaken in ordering that as a matter of Law a sidewalk was no part of a Street or Highway that it was a question the Judge should have left to the Jury that tried the case whether the Sidewalk or foot path was not so connected with the wrought part of the road or with the carriage way & so used for travel as to make

the Town liable for its condition
+++ The Court further say that
if the case had been so left
to the jury they might
have found that from the long
time that state of things had
continued & from the public
notoriety of the fact of the
existence of the sidewalk
that the sidewalk by long
continued public use with
the knowledge & acquiescence of
the Town was recognized as a
part of the brought & finished
back of the Road".

The Court in the same case
say (page 337) "we understand
the travelled path ^{of a road} to be that
which, with the knowledge &
acquiescence of the Town
is used for public travel

Counsellors at Law,

P. C. Bacon. W. S. B. Hopkins. Henry Bacon.

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within the located limits of
the way"

You will see that
the Fitchburg case went to
a jury after this & the jury
found upon that trial that
the sidewalk was a part of
travelled street though it
was not constructed or
repaired by the Town &
I am of opinion upon
the facts stated to me
in your case that ~~upon~~
under the same rulings
& decisions the Jury will
find that ~~for~~ the
sidewalk in your case
is a part of the travelled

part of your Highway & no
doubt will find the stones were a defect

The second question in
Every Road case ~~was~~ under
the Law as it now stands
Public Stat C. 52 Section 18
is did ~~you~~ ^{the} Town have reasonable
notice of the defect. In my
opinion the Court will hold
that ^{notice to} the Highway Surveyor
was notice to the Town ~~the~~
the Highway Surveyor is a
Town being one of those
Municipal Officers whose
Special Duty is the Care of
the Road & Highways & I
do not think the Court will
hold that the Town can
take any advantage of
the fact that the Select
men did not assign him
his limits in writing

Counsellors at Law,

P. C. Bacon. W. S. B. Hopkins. Henry Bacon.

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I may here say I understand the fact to be that this Surveyor who left these stones complained of in the side walk was at work ~~within~~ within the limits verbally assigned him by the Selectmen. I do not see but one chance for your Town to defend ~~in~~ this case & that chance I don't think ^{of} much account or value & that is this, The statute provides in substance & effect Pub Stat C 52 section 18 that the Town shall not be liable ~~in~~ ⁱⁿ such cases where the defect could have been

remedied or where the damage
or injury might have been
prevented by reasonable care
& diligence on the part of the
Town or its officers -

& the question might be put
& the Town might contend that
admitting the defect to
have existed in the side-
walk the officer did all
that a reasonable man
~~to~~ could be required to do
to remedy it & to prevent
the injury that the Com-
plainant subsequently
sustained if any But I
fear the jury will find
that the Surveyor being
the very man that
let put & left the stones
there & thus himself
created & made the defect

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he the surveyor was bound to have done more than he did actually do to remedy the defect & to have presented the injury & I fear therefore the jury will find against the town upon this point also & I am not by any means sure that the Court will not rule that the town would be liable at all events if its Highway surveyor himself put a pile of stones in the road at near dark & a person is injured even though it should be proved that

the Highway Surveyor was
away in search of a
Lantern at the very time
the person was injured &
that he went in search of
it immediately after he
put the stones there

My impression is therefore
that the Town has not got much
of a chance of depending against
this claim if it is an honest
fair one. I was led to doubt
from what was stated to me
whether the person was in
fact much if at all
injured. Of this you must
judge.

Yours truly,

P. C. Bacon

in a culvert or drain on land
of Burnett & we are of opinion
that the Town is not liable
to Mrs. Burnett or her tenant
in any way, the Town having
obtained a prescriptive right
to have (by 50 years use) all
proper material whether
liquid or other, coming from
the Estey land, pass off through
the Burnett Culvert or
drain onto the Burnett
land, . . . If Estey allows
noxious material or sources of
filth to pass into & through
the Town's Culvert onto the
the Town merely not preventing it
grounds of Mrs. Burnett,
Mr. Estey if any one would
be the party liable & not the
Town as we think. & as
we understand the facts
the Town never having

BACON, HOPKINS & BACON,

Counsellors at Law,

P. C. Bacon. W. S. B. Hopkins. Henry Bacon.

Worcester, Mass., Aug 8 1882
Tuesday

J. W. Hammond, Esq,
Cordaville,
(Selectman) P.O.
Southboro,

Dear Sir,

My partner Col.
Hopkins & myself have ^{exam-}
ined the question you left
with him yesterday in regard
to the liability of your
Town "for not preventing any
noxious liquid or other material
passing through the Town's
culvert from the land of Etey
to the land of ^{this} Burnett & for
not clearing ^{or removing} away Obstructions

Worcester, Mass., 188

had any thing to do with the
Burnett Culvert & not
being bound to keep it
in repair we are of
opinion that Mr Burnett
or her tenant would be
liable to remove the
obstruction in the Culvert
on the Burnett Land & not
the Town the Town never having
done any thing to produce
or cause the obstruction

Yours truly,
P. C. Bacon

Bacon Hephieso Bacon
Letter Aug 8th 1882 in
relation to Train from
Est. to Mrs. Fay-

BACON, HOPKINS & BACON,

Counsellors at Law,

P. C. Bacon. W. S. B. Hopkins. Henry Bacon

(Copy)

Worcester, Mass., 188

Voted That The Treasurer
with the approval of the
Selectmen, to live money
in anticipation of the
taxes of the current year,
and the debts incurred
under the authority of
this vote are hereby
made payable from
said taxes. "

Meeting, March 29, 1881.

the whole matter as
they see fit. I suppose
the Town will probably
vote to begin a suit
on the Treasurer's Bond
of amt \$1000 & the
Directors but of course
I can't say what they
may do.

The Selectmen
of course can insert as
many more articles in
your meeting warrant
as they see fit.

If I have
omitted any thing
write ~~me~~ me.

Yours S. P. Bacon

P.S. I send draft of two
Articles for your warrant
enclosed

5

to do any thing in the
way of commencing any
Law proceedings or suit,
till the Town orders it
& in order to give the Town
a chance to ~~do~~ act for
upon the whole matter
& direct what they see
fit about it the
Selectmen had better
call a Town meeting
after all the above is done
to act on this matter

I enclose a draft
of one of the articles
to be inserted in the
Town warrant calling a
meeting &

Let the Town
then take such course
& vote such orders about

we have to say that
 the Selectmen had better
 see into & have him take
 up the notes at once
 & if he will not or does
 not at once do it why
 then demand ^{of him} that he pay
 over the amount of it
 to the present Treasurer
 of the town at once &
 if he does not do that
 at once then notify ~~him~~
~~the~~ the selectmen & demand
 that they pay over the
 amount to the new
 Treasurer

But after this is
 all done (& let it be
 done as soon as may
 be) we think it is not
 best for the Selectmen to

we don't think the
 omission ^{even} if it is an
 omission in the 'Record'
 Book itself will destroy
 the validity of the vote

We think the vote will
 be good & valid even if
 those words are omitted
 & we do not feel sure
 but the ^{then} Town Clerk
 if he is now Town Clerk
 could now amend the
 record of 1881 & make
 it right even now
 Let me hear from
 you about this
 mistake if it is one

Now you will want
 to know what is to be
 done well as to this

on said vote & not have
paid the money to or accounts
for the same to the Town
as such Treasurers & to
see if what measures of
~~any~~ the Town will take
in ^{said Comptrolers & in regard to} regard to collecting said
sum & interest of said Ete. &
his ^{& to see if the Town will} sanction ~~as~~ act of.
vote any thing in relation
to said matters above
mentioned.

To see if the Town will
have the whole matter
of Mr. Ete.'s Treasurership of
the Town ^{& his accounts & have a full & complete} investigated &
reported report to appoint
all such Committees
as may be proper in
regard to said matters & the matters
embraced in the Article next
preceding this

There is such a case

Worcester, Mass., 188

Two Articles in Town
meeting
wanted

To see what the Town will
do in regard to a note
of 1800 dollars & interest
given in Sept 1881
by the late Treasurer
of this town to Marlboro
Savings Bank, said note having received the money on it
Still due said Bank & to
see what shall be done
about payment of
same if the Town is
liable upon it & what
the Town will do
about the said note
having received the money

BACON, HOPKINS & BACON,

Counsellors at Law,

P. C. Bacon. W. S. B. Hopkins. Henry Bacon

Worcester, Mass., Aug 9 1883
Thursday

Mr Webster,
Treasurer of South Lee,

Dear Sir,

Yours of this date
with Stated Enclosures is
just received —

Replying to it I
have to say that my partner
Col Hopkins & I have examined
the vote of your Town in
1881. authorizing your
Treasurer to borrow ~~the~~
money payable out of
the Taxes of 1881. I have
also examined the Copy
of the Note to the W Savings

Bank & we think the Court
will say they are ~~all~~ all
substantially correct & valid
& that your Town is bound
legally to pay the \$18000
note to said Mr. S. Bank

The only thing we see
about the copy of the vote
you sent us, that ~~but~~ we
do not deem quite right is
the omission in the copy of
the word "he authorized"
in the copy

Is it an omission
by the Clerk or the one that
made the copy,

I send you
a copy of the copy you
sent me you will
see those words "be
authorized" are omitted

Bacon & Hopkins & Bacon
Opinion & Advice in
regard to F. Est. Note
at Marlboro Savings Bank

1883

Worcester, Mass., 188

P. C. Bacon, W. S. B. Hopkins, Henry Bacon

Counsellors at Law,

BACON, HOPKINS & BACON,



WORCESTER COUNTY
FREE INSTITUTE OF INDUSTRIAL SCIENCE.

Worcester, Mass., *Feb. 21* 188 *4*

C. W. Newton-Esly
Mason

Dear Sir:

How is it that the interest in
the note of your name held by us
is paid so long before it is due -
by Mr. Esly instead of yourself?

I had supposed until today that
he was still mason of the name
but learning that he is not - I write
to ascertain if it is all right.

Yours truly
Waldo Lincoln
Mas.



WORCESTER COUNTY
FREE INSTITUTE OF INDUSTRIAL SCIENCE.

Worcester, Mass., April 6 1884.

Gentlemen:

Will you please inform me whether there is any question as to the legality of the note of the Town of Southboro which is held. There has been some newspaper talk here that the note is not good & some criticism of my predecessors for taking such a note.

In my opinion there can be no question but I would like to hear from you.

I would also like to know whether it is the intention of the Town to pay the note ^{now} or if they desire to let it run longer. An early answer will oblige

Yours very truly

Waldo Lincoln Treas.

Worcester December 4/72

\$ 673.57

Received of Franklin Cate Treas—
Six hundred seventy three ⁵⁴/₁₀₀ being amount of
Interest due on Notes of (\$5000) and \$7,000 (Dec 18 + Nov 2)
against town of Southboro. which I hold as Treas
David Whitcomb Treas

673.57
125.00
848.57

Intend 1872

D. Whitcomb



WORCESTER, MASS.

April 12 1884

Waltham:

I have no reply as yet to my letter of last week. My object in writing it was to save trouble to you & myself. I have no desire to embarrass you now & if you acknowledge the validity of the note we will wait the bank's convenience as regards payment - at least for the present. But if you question its validity it will be my duty to demand payment & if refused to bring suit. An early answer will oblige

Yours truly

Waldo L. Cole
Mass
Wm. C. Lee Institute

Worcester May 19 1876
Mr. F. Estey Dear
Southboro

Sir Your ch
received for Three hundred eighty five
dollars (385.00) in payment of interest
on the Boynton Note, against the town
of Southboro. due May 14 1876

Respectfully Yours
David Whitcomb
Treasr

D. Whitcomb

1870.

Worcester Dec 29/70
\$215-00
Received of Franklin Esty Treas
of town of Southboro Two hundred twenty-
five dollars being the amount
of Int ^{Dec 18/70} ~~due~~ from above town on a
Note of \$5.000- which I hold
as Treasur- (d

David Whitcomb
Treasur

Mr Esty.
The Principal of the Note is due
Dec 18th. It can lay as it is. Interest
7 per ct. semi annually- if you let
me know by return mail-
D Whitcomb

Treasur

D. Whitcomb

1870

Southboro April 19, 1883
To the Selectmen of the Town of Southboro.

Gentlemen

I
Franklin Este of said Southboro, Town
Clerk, Town Treasurer, one of the Fence Viewers,
Dealer of Weights & Measures, and one of the Committee
on Cemeteries and Common, of said Southboro,
herely resign each and all of the offices aforesaid,
and this resignation is to take effect April 20, 1883,
or as soon thereafter as my successors are appointed
and sworn.

Franklin, Este

H Est³ n^o sig^o mat^o
of Town Officers Apr^l
19th 1883 -

Boston April 7th 1883.

Messrs John W. Hammond,
 Charles P. Savin. } Selectmen.
 Joseph Fairbanks }
 Southborough. Mass

Gentlemen,

I have made examination of the books of Mr. Franklin Este, your Town Treasurer, covering a period from March 1st 1879 to February 28, 1883, I find his accounts very well kept, and the system in use well adapted to the requirements of the Town, The additions & Extensions are all correct; The disbursements are substantiated by proper vouchers, and the record of cash receipts corresponds with the reports of the various other Town officers; The amount of cash in his hands is correct as shown by the books

The average rate of interest paid by the Town on "temporary loans" during the past four years is a trifle less than four per cent per annum.

The notes of the Town appear to have been generally paid promptly at maturity, excepting

the note given the State Treasurer in June 1882 for twenty five hundred dollars, due & payable December 22^d 1882 which remained unpaid until the 19th March 1883. By the Cash book there does not appear to have been funds enough in the treasury at the time the note became due, to meet it.

I notice that the interest on the Town's debt of twenty five thousand dollars (\$25,000) due to the Commonwealth, has, the past three years been paid annually, instead of twice a year as was the custom before that time, by reason of which the Town has in one instance certainly, been necessitated to pay interest for six months (@4% per annum) on the deferred payment, amounting to fifteen dollars (\$15.00)

To meet the year's interest due the Commonwealth September 25, 1882 (fifteen hundred dollars) a Town note for two thousand dollars (\$2000) was issued; made in the usual form; signed by the Treasurer and approved by two of the Selectmen, and sold to the State Treasurer. This note has since been paid, but no record appears

in the Treasurers books either of the Cash received from the sale of the note, or of the Cash used in its payment, or in the payment of the interest thereon. nor is the note mentioned in the "Statement of Town debt and assets" printed in the "Ninth Annual Auditor's report" for the financial year ending February 28. 1883, although at that time the note was outstanding & unpaid.

Yours truly
Merace D. Bradbury
Accountant.

Harace D. Bradbury
report to selectmen of
Treasurers books from 1879
to 1883